

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JARMAAL SMITH,

No. C 10-4389 CW (PR)

Plaintiff,

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT;
ADDRESSING NON-DISPOSITIVE
AND DISCOVERY-RELATED MOTIONS

v.

DR. NANCY ADAM, et al.,

(Docket nos. 27, 31, 33, 34,
35, 36, 42, 50, 52, 53)

Defendants.

INTRODUCTION

Plaintiff, a state prisoner incarcerated at Pelican Bay State Prison (PBSP), filed this pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to his serious medical needs by medical practitioners at PBSP.

Defendants Dr. Nancy Adam, Family Nurse Practitioner (FNP) Sue Risenhoover, Registered Nurse (RN) Joseph Escobar, and Licensed Vocational Nurses (LVN) Rebecca Stone and Andrey Andrsh have filed a motion for summary judgment. Plaintiff has opposed the motion and Defendants have filed a reply. Also pending are various non-dispositive motions filed by the parties.

For the reasons discussed below, the Court GRANTS Defendants' motion for summary judgment.

BACKGROUND

The following facts are taken from the parties' verified pleadings, declarations and attached documentary evidence. They are undisputed unless otherwise noted.

Since February 2006, Plaintiff has been treated by prison

doctors for his intermittent migraine headaches and facial nerve twitching. His medical records reflect that, through July 2008, he was prescribed the following medications at the noted correctional institutions for his headaches:

High Desert State Prison:

2/06 - Motrin 400 mgs., Naproxen 500 mgs.

California State Prison-Sacramento:

8/06 - Robaxin 50 mg.

9/06 - Elavil 10-25 mg.

11/06 - Naproxen 500 mgs., Tylenol 975 mgs.

1/07 - Isomethept/Dichloralphen

2/07 - Midrin, Tramadol 50 mg., Naproxen 500 mgs.

California Substance Abuse Treatment Facility (CSATF):

5/07 - Ultram 50 mg.

7/07 - Robaxin 750 mgs., Methocarbamol 750 mgs.

9/07 - Methocarbamol 750 mgs., Ultram 50 mgs., Tramadol 50 mgs.

10/07 - Methocarbamol 750 mg.

11/07 - Imitrex 100 mg., Methocarbamol 750 mg.

12/07 - Motrin 800 mg.

California State Prison-Corcoran (Corcoran):

5/08-6/08 - Acetaminophen/Codein no. 3, Ibuprofen 800 mgs.

7/08 - Acetaminophen/Codein no. 3, Ibuprofen 800 mgs.,
Tramadol 30 mgs.

Pl.'s Decl. Supp. Opp'n Summ. J. (Pl.'s Decl.) ¶ 41.

In December 2007, a doctor at CSATF referred Plaintiff for a neurology consultation for his complaints of facial numbness and twitching. Opp'n Ex. J at 181. Plaintiff was transferred to Corcoran before the consultation took place. On August 12, 2008,

1 while incarcerated at Corcoran, Plaintiff had a neurologic
2 consultation. The consulting neurologist described Plaintiff's
3 presenting illness as follows:

4 This is a 27-year-old male who is complaining of
5 twitching of various portions of the body. He also
6 complains of some headaches. Apparently in 2006, was
7 stabbed on the left cheek and subsequently began having
8 facial twitching. The twitching, however, extended to
9 the rest of the head, the throat, the neck, and the
10 upper and lower extremity. The patient had an
11 electrodiagnostic studies [sic] done by Dr. Lin and
12 there was normal nerve conduction study of the left
13 upper extremity and of the left face. He was placed on
14 Neurontin but did not tolerate it because of nausea,
15 vomiting and of abdominal pains. The patient complains
16 of numbness in various portions to the body. In 2006,
17 had an MRI scan because "he was assaulted by a C.O."
18 The scan was reportedly negative although we do not have
19 the formal report.

20 The patient also complains of chest pains and was
21 recently sent to a hospital for a same workup, it was
22 negative but he is now complaining of numbness of the
23 veins where he had been punctured.

24 Opp'n Ex. K at 188.

25 The neurologist's examination of Plaintiff was unremarkable.
26 He summarized his impressions as follows: "Diffuse twitching and
27 total headache etiology unclear." Id. at 189. He recommended
28 that Plaintiff be prescribed Lyrica, 50 mg. four times a day, "to
see if this neurotic pain and the twitching might respond." Id.
Lyrica is used to treat pain from damaged nerves. He also
recommended blood tests and an MRI scan of Plaintiff's head.

29 In early September 2008, Plaintiff's physician at Corcoran
30 prescribed Gabapentin, 300 mg. three times a day, for Plaintiff.
31 Opp'n Ex. K at 190. Gabapentin (brand name Neurontin) is a drug
32 that is approved to prevent seizures and treat post-herpetic
33 neuralgia. Decl. Michael Sayre, M.D., Supp. Mot. Summ. J. (Sayre
34 Decl.) ¶ 6 & Ex. A. Headaches and neuropathic pain are off-label

1 uses of Gabapentin. Id. Additionally, Plaintiff's doctor
2 continued his prescriptions to treat his headaches with
3 Acetaminophen/Codein no. 3 four times a day, and Ibuprofen, 800
4 mgs. four times a day. Opp'n Ex. K at 192. In November 2008,
5 the doctor increased the Gabapentin prescription to 600 mgs. three
6 times a day "for facial twitching" and prescribed Tramadol, a pain
7 reliever, 50 mgs. four times a day, for Plaintiff's headaches.
8 Id. at 193.

9 Plaintiff was transferred to PBSP on December 2, 2009.
10 Pursuant to California Department of Corrections and
11 Rehabilitation (CDCR) policy, his existing prescriptions were
12 continued for thirty days upon his arrival. Sayre Decl. ¶ 3. The
13 liquid form of Gabapentin was ordered, which equaled 16 cc three
14 times a day. Id. & Decl. Valerie Ly, Esq., Supp. Mot. Summ. J.
15 (Ly Decl.) Ex. A.

16 On December 22, 2009, FNP Risenhoover, with the approval of
17 Dr. Sayre, the Chief Medical Officer at PBSP, changed the order
18 for Gabapentin to be given two times a day instead of three. Ly
19 Decl. Exs. B & E. According to Dr. Sayre, the order was changed
20 to twice a day because a third pill pass was not indicated for
21 Plaintiff's case. Sayre Decl. ¶ 4. At PBSP, a third pill pass is
22 an extraordinary staff effort that must have significant benefit
23 to be justified. Id. The new prescription was ordered for seven
24 days. Ly Decl. Ex. B.

25 LVNs Andrsh and Stone were two of the nurses who administered
26 the Gabapentin. Plaintiff filed grievances complaining that, on
27 December 22 and 23, LVN Stone gave him only 14 cc of the drug,
28 instead of the prescribed 16 cc, and that LVN Andrsh did the same

1 on December 25. Ly Decl. Exs. C & D.

2 The Gabapentin was discontinued on December 29, 2009, by FNP
3 Risenhoover and Dr. Sayre's orders, for the reason that it was not
4 medically indicated for Plaintiff's condition. Sayre Decl. ¶ 25;
5 Ly Decl. Ex B. As explained by Dr. Sayre in his declaration:

6 Mr. Smith's original prescription for Gabapentin in
7 2008 was for an off-label use of neuropathy. However,
8 recent medical research has shown that Gabapentin is not
9 truly effective for most cases of neuropathy.
10 Gabapentin is currently only approved for adjunctive
11 therapy for seizures and post-herpetic neuralgia and, as
12 such, have the evidenced base documentation to support
13 use [sic]. Headaches and neuropathic pain are off-label
14 uses of Gabapentin and have no evidence based
15 documentation to support its use [sic].

16 Sayre Decl. ¶ 6.

17 In support of his declaration, Dr. Sayre has attached a
18 medical article published in May 2010 that discusses the results
19 of several medical studies on the off-label use of Gabapentin for,
20 among other things, neuropathic pain and migraine symptoms. Based
21 on these studies, the article concludes that such off-label uses
22 provide questionable benefit and can increase the potential for
23 harmful side effects for the patient. Sayre Decl. Ex. A.

24 Dr. Sayre further explains in his declaration that it is CDCR
25 practice "to not prescribe medication for off-label use unless
26 there is documented evidence based need" and it is "established
27 CDCR pharmacy and formulary policy to use evidence based medicine
28 and prescribing practices." Sayre Decl. ¶ 7. In support of his
statement, Dr. Sayre has attached to his declaration the CDCR
policy on off-label use of prescription medications, which
provides as follows:

I. Definitions

Off-label use: use of a drug for an indication not

1 listed in the package labeling, use of a drug at
2 doses not supported in the package labeling, or use
of a drug in the presence of a contraindication
3 listed in the package labeling.

4 II. Policy

5 The off-label use of a drug shall be based on sound
6 scientific evidence, expert medical judgment, or
7 published literature and should be done in good
faith with the safety and best interest of the
8 patient-inmate in mind. All efforts should be made
9 to utilize drug regimens approved by the Food and
Drug Administration before using an off-label drug.
A risk-benefit assessment must prove the off-label
10 use would represent a significant medical advantage
to the patient-inmate and outweigh all potential
11 negative outcomes. The practitioner who prescribes
a drug is responsible for deciding which drug to
use, the dosing regimen and the indication for use
in each patient inmate. The decision should be
12 made based on information contained in the drug's
label.

13 Sayre Decl. Ex. B.

14 On January 5, 2010, Plaintiff was seen by Dr. Adam. He
15 complained of severe headaches every one to three months and nerve
16 twitching. According to Dr. Adam's progress notes of the meeting,
17 Plaintiff told her that he had been prescribed Neurontin
(Gabapentin) in 2008, which "helped his nerve twitching" when he
18 was taking 800 mg. twice a day, "but did not help his headaches,"
19 and that since his prescription had been discontinued on December
20 29, "he has had daily episodes of twitching on his face, scalp,
21 throat." Ly Decl. Ex. F at 1. Plaintiff asked for a prescription
22 for Gabapentin and to see a specialist for his headaches and nerve
23 twitching. Compl. ¶ 22. He also asked for a prescription for
24 Tylenol #3 (with codeine) for his headaches. Ly Decl. Ex. F at 1.

25 After examining Plaintiff, Dr. Adam wrote that he suffered
26 from headaches, possibly migraine, occurring only every one to two
27 months and that he did not have neurological symptoms, such as
28

1 localized weakness or vision changes, during the headaches. Ly
2 Decl. Ex. F at 1. Based on these observations, she prescribed
3 Tylenol #3, to be taken as needed for the headaches. In so doing,
4 she "warned" Plaintiff that if he used the medication
5 continuously, instead of only as needed, it would be discontinued;
6 she expected he would use approximately eight doses a month. Id.

7 Concerning Plaintiff's nerve twitches, Dr. Adam noted that,
8 while he stated that the twitches abate with Neurontin use,
9 "Neurontin is not medically indicated for this condition." Ly
10 Decl. Ex. F at 1. She also determined that a consultation with a
11 neurology specialist was not medically indicated. Decl. Nancy
12 Adam, M.D., Supp. Mot. Summ. J. (Adam Decl.) ¶ 3. Dr. Adam wrote
13 that she would obtain Plaintiff's entire medical chart so that she
14 could review the neurology consultation he had in 2008 and try to
15 determine whether the consultation had been for his headaches or
16 facial twitching, the reason Neurontin had been prescribed, and
17 what medications previously had been tried for his headaches. Ly
18 Decl. Ex. F at 1-2.

19 On January 13, 2010, Dr. Adam determined that Plaintiff had
20 requested and received seven doses of Tylenol #3 between January 7
21 and 13, whereas she had expected him to receive at most eight
22 doses a month. She concluded that he was taking the medication
23 regularly, rather than as needed; therefore, she discontinued the
24 prescription. Adam Decl. ¶ 4.

25 On January 14, 2010, Plaintiff submitted an emergency health
26 care request asking to have his Tylenol #3 medication reinstated.
27 Compl. ¶ 135. On January 27, 2010, he was seen by Nurse Elliott.
28 He told her that his headaches had returned since the Tylenol #3

1 had been discontinued, that he was experiencing continued painful
2 nerve twitching, and that he also was having chest pains. Nurse
3 Elliott scheduled him to see a physician for these concerns. Ly
4 Decl. Ex. I.

5 On February 25, 2010, Plaintiff was seen by FNP
6 Risenhoover in response to his sick call slips. According to
7 Plaintiff, the following occurred at that visit: he inquired why
8 he had not been seen sooner and Risenhoover replied that she "did
9 not think his condition was serious enough to warrant immediate
10 attention" Compl. ¶ 148. Risenhoover also stated, "I
11 don't believe you need Gabapentin for your condition and that
12 medication is not issued by" the CDCR. Compl. ¶ 153. Plaintiff
13 also "attempted to explain to this nurse that he had recently been
14 experiencing chest pain and cramping around his heart area," that
15 in August 2008 he was hospitalized for an irregular heartbeat --
16 the origin of which had not been determined -- and that he had
17 been advised to tell prison staff to refer him to a cardiologist.
18 Compl. ¶¶ 159-161. He asked Risenhoover to refer him to a
19 cardiologist because his condition was getting worse, but
20 Risenhoover responded that he would have to submit another sick
21 call slip because he could only talk about one issue at a time.
22 Compl. ¶¶ 163-166. Plaintiff asked Risenhoover whether she had
23 reviewed his file prior to his visit. Risenhoover responded, "I
24 don't need to, migraines are not treated with Gabapentin." Compl.
25 ¶ 169. She did not prescribe Plaintiff any medication.

26 In contrast to Plaintiff's evidence, Defendants present
27 evidence of Risenhoover's progress notes from her February 25,
28 2010 meeting with Plaintiff, which show that she examined him,

1 reviewed his medical chart, including his neurology consultations
2 in 2008 and his EKG results from December 2009, informed him that
3 Gabapentin was not medically indicated, and prescribed Ergotamine
4 for his migraine headaches and Ibuprofen and Almag (an antacid)
5 for his chest pains. Ly Decl. Ex. J. She also ordered another
6 EKG and chest x-rays. Plaintiff refused the EKG, id. Ex. L at 1;
7 the x-ray was taken on March 10, 2010, and showed that Plaintiff's
8 heart was not enlarged and there had been no change since his last
9 chest x-ray in December 2009. Id. Ex. K.

10 On March 18, 2010, Defendant RN Escobar responded to
11 Plaintiff's cell when he complained of chest pains. Plaintiff
12 told Escobar that he felt as if he had lost his breath for several
13 minutes. Escobar took Plaintiff's vital symptoms; his pulse was
14 62.¹ Escobar escorted Plaintiff to the medical clinic and
15 reviewed his file. He noted that Plaintiff's previous x-rays did
16 not show an enlarged heart and that he had no shortness of breath,
17 was not gasping for air, and was speaking clearly. Escobar
18 escorted Plaintiff back to his cell without referring him for
19 further care. Ly Decl. Ex. L.

20 Later that night, Plaintiff complained of dizziness and
21 shortness of breath. A correctional officer contacted medical
22 staff and Plaintiff was seen by a nurse in the medical clinic who
23 assessed him and concluded that his symptoms did not appear to be
24 cardiac related. Plaintiff was told that he would be put on the
25 sick call list the next day for a doctor's appointment; he was
26

27 ¹ For an adult, a normal resting heart rate ranges from 60 -
28 100 beats per minute. Sayre Decl. ¶ 8.

1 given Almacone for indigestion and Ibuprofen for chest pain and
2 was returned to his cell. Ly Decl. Ex. M.

3 On March 23, 2010, Plaintiff was seen by a nurse for
4 complaints of cramping around the heart. The nurse noted that his
5 last chest x-ray, taken on March 2, 2010, was normal. She gave
6 him Tylenol for pain, advised him to continue to take Almacone for
7 indigestion, and told him she would review his file and discuss
8 his complaints with his physician. Ly Decl. Ex. N.

9 On April 1, 2010, Plaintiff was seen by Risenhoover for
10 complaints of chest pains, headaches and nerve twitches. He
11 requested a renewal of his prior Gabapentin prescription, saying
12 that it worked better than Tylenol #3 for his symptoms.
13 Risenhoover reviewed his medical file; she offered to prescribe
14 Ergotamine, Ibuprofen, Naprosyn and Tylenol for his headaches but
15 he refused, saying that only Gabapentin worked but he would take a
16 prescription for Tylenol #3. Risenhoover prescribed Tylenol #3
17 for seven days and told him that she would refer his case to the
18 medical committee for review. Ly Decl. Ex. P.

19 On April 1 and 10, 2010, Plaintiff underwent EKGs for his
20 chest pains. The results were unremarkable. Adam Decl. ¶ 5.

21 DISCUSSION

22 I. Non-Dispositive Motions

23 A. To Enlarge Time and Amend Complaint (Docket Nos. 31, 34)

24 Plaintiff originally named as a Defendant in this action LVN
25 "A. Anders." In response to the Court's Order of Service,
26 Defendants' counsel represented that no individual by that name
27 ever had been employed at PBSP. Consequently, the Court directed
28 Plaintiff to provide the correct name and address for that

1 Defendant. Plaintiff moved for an extension of time to provide
2 the Court with the requested information and, subsequently, after
3 learning the Defendant's true identity, moved to amend his
4 complaint to add LVN Andrey Arsh as a Defendant. Since then, Arsh
5 has been served with the complaint and appeared as a Defendant in
6 this case. Accordingly, Plaintiff's motion for an extension of
7 time to discover this Defendant's identity is DENIED as moot; his
8 motion to amend his complaint to name Andrey Arsh as a Defendant
9 is GRANTED.

10 B. Reconsideration (Docket no. 35)

11 Early in these proceedings, Plaintiff filed a motion for a
12 preliminary injunction directing Defendants to provide him with
13 Gabapentin. The Court denied the motion without prejudice because
14 it had not been served on Defendants and informed Plaintiff that
15 he could file a renewed motion for preliminary injunctive relief.

16 By way of the present motion for reconsideration, Plaintiff
17 objects to the Court's direction that he file a renewed motion for
18 a preliminary injunction and asks the Court to decide his prior
19 motion on the merits. Plaintiff's request is DENIED as moot
20 because the Court, by this Order, grants Defendants' motion for
21 summary judgment. Therefore, Plaintiff is not entitled to
22 injunctive relief.

23 C. Discovery-Related Motions

24 1. Subpoena Duces Tecum (Docket no. 27)

25 Plaintiff moves the Court, pursuant to Rule 45 of the Federal
26 Rules of Civil Procedure, to prepare, issue and serve a subpoena
27 duces tecum on a non-party, Maureen McClean, Chief Executive
28 Officer of PBSP, for the production of documents pertaining to the

1 investigation of his administrative appeals and other complaints
2 filed by inmates against Defendants. Defendants object to the
3 request because Plaintiff has not used proper procedures for the
4 issuance and service of a subpoena duces tecum, and also because
5 he has not sought the requested documents from them directly
6 pursuant to Rule 34. In response, Plaintiff asserts that, as of
7 the date of his reply, he has sought the documents from Defendants
8 and they have objected to his requests on grounds of privilege.

9 Defendants are correct that the Court is not responsible for
10 preparing and serving subpoenas for Plaintiff. Further, since the
11 filing of Plaintiff's motion the parties have engaged in further
12 discovery and filed their papers in support of and in opposition
13 to Defendants' motion for summary judgment. Based on the record
14 developed by the parties, the Court finds that the documents
15 Plaintiff seeks by way of this subpoena duces tecum are not
16 relevant to a decision on the merits of his claims. Specifically,
17 he does not charge any Defendant with the improper denial of an
18 administrative appeal and, as discussed in more detail below,
19 complaints brought by other inmates against Defendants are not
20 relevant to a determination whether Defendants provided him with
21 constitutionally adequate medical care. Accordingly, Plaintiff's
22 motion is DENIED.

23 2. Additional Interrogatories (Docket no. 33)

24 Plaintiff, having served Defendants Dr. Adam and FNP
25 Risenhoover with interrogatories and requests for production of
26 documents and received their responses thereto, moves to expand
27 the twenty-five interrogatory limit set forth at Rule 33(a)(1).
28 Defendants object to the request because Plaintiff already has

1 served on these Defendants three sets of combined interrogatories
2 and requests for production of documents that include twenty
3 interrogatories directed to each of them, he does not state how
4 many additional interrogatories he intends to propound, and he
5 does not make a particularized showing demonstrating the need for
6 additional interrogatories. The Court agrees. Accordingly, the
7 motion is DENIED.

8 3. Deposition of Dr. Adam (Docket nos. 36, 42)

9 Prior to the filing of Defendants' motion for summary
10 judgment, Plaintiff moved for leave of court to take the oral
11 deposition of Dr. Adam. The Court denied the motion as premature
12 because of the parties' failure to meet and confer to resolve the
13 discovery matter out of court. The Court noted that Plaintiff's
14 right to discovery in this regard could be accommodated by way of
15 written depositions conducted pursuant to Rule 31, and stated that
16 it would modify that procedure to allow the deponents to provide
17 written answers to the written deposition questions. Thereafter,
18 Plaintiff informed Defendants' counsel of his intent to depose Dr.
19 Adam orally. Defendants' counsel responded that Plaintiff's
20 questions could be answered through interrogatories or the
21 deposition could be conducted via written deposition, as provided
22 in the Court's order.

23 Plaintiff then filed the instant motion for leave of Court to
24 take the tape-recorded deposition of Dr. Adam at PBSP. Defendants
25 oppose the motion and also seek a protective order precluding the
26 deposition. Specifically, Defendants object that Plaintiff has
27 not complied with Court's discovery schedule for noticing a
28 deposition and that allowing him to depose Dr. Adam orally would

1 impose undue burden and expense on Defendants and the CDCR,
2 including: transportation of Plaintiff to and from the deposition,
3 providing security for the deposition, providing the means of
4 recording the deposition, and transcribing the deposition.
5 Further, Defendants assert that the information Plaintiff seeks by
6 way of the deposition either already has been provided to him in
7 response to his discovery requests or could be provided to him by
8 way of written deposition.

9 A plaintiff has no absolute right to attend a deposition in
10 his action. Lawful incarceration results in the limitation of
11 many privileges and rights, including the right under 28 U.S.C.
12 § 1654 of parties to plead and manage their own causes personally.
13 See In re Terry L. Collins, 73 F.3d 614, 615 (6th Cir. 1995)
14 (citing Price v. Johnston, 334 U.S. 266, 285-86 (1948)). In
15 determining whether to permit an inmate to attend pretrial
16 depositions, the court should consider the costs and security
17 risks involved in transporting the inmate to the deposition site
18 and in maintaining his presence at the deposition, the importance
19 of the testimony of the deponent to the claims alleged, the need
20 for the inmate to be physically present during the deposition, the
21 inmate's individual security history, general security issues, and
22 the availability of alternative means to accommodate the concerns
23 of both the inmate and the prison officials. See id. at 615.

24 The Court finds that in view of the undisputed evidence of
25 security concerns and expenses detailed by Defendants and
26 Plaintiff's ability to obtain the information he seeks from Dr.
27 Adam by other means, allowing him to depose Dr. Adam orally in
28 this case is not warranted. Accordingly, Plaintiff's motion is

1 DENIED and Defendants' motion for a protective order is GRANTED.

2 4. Motion to Compel (Docket no. 52)

3 Plaintiff has filed a motion to compel responses to
4 interrogatories and requests for production of documents to which
5 Defendants have asserted objections. Defendants oppose the
6 motion.

7 a. Accusations/Lawsuits By Other Inmates

8 In Plaintiff's interrogatory numbers 2 to Dr. Adam, 2 to FNP
9 Risenhoover, 2 to RN Escobar and 1 to LVN Stone, he inquires
10 whether they have been accused of negligence or cruel and unusual
11 punishment by any inmate. In interrogatory numbers 3 and 4 to Dr.
12 Adam, 3 and 4 to FNP Risenhoover, and 3 and 4 to RN Escobar he
13 inquires whether they ever have been sued by any inmate and, if
14 so, the nature of the claim asserted in the lawsuit. In
15 interrogatory numbers 4-6 to LVN Stone he inquires whether any
16 inmate has lodged a complaint against Stone concerning a failure
17 to provide medication. Plaintiff claims this information is
18 relevant because it will establish Defendants' motive or intent.

19 Defendants object to these requests on the grounds they seek
20 character evidence and information that is not relevant or likely
21 to lead to the discovery of admissible evidence, is beyond the
22 scope of permissible discovery pursuant to Rule 26, seeks
23 confidential information that is protected by Defendants' and
24 third parties' rights of privacy, and is unduly burdensome.

25 The Court agrees with Defendants that evidence of medical
26 accusations and/or complaints made by other inmates is irrelevant
27 and not reasonably calculated to lead to the discovery of
28 admissible evidence concerning Defendants' motive or intent with

1 respect to their treatment of Plaintiff. Plaintiff's claims
2 against Defendants are based on his own medical treatment.
3 Accusations of negligence and/or a violation of the Eighth
4 Amendment or lawsuits filed by other inmates fail to evidence
5 Defendants' liability toward Plaintiff. Further, Plaintiff has
6 not demonstrated that his need for the information, which concerns
7 the medical care of other inmates, outweighs the privacy rights of
8 Defendants and the inmates making the accusations. The requests
9 are also overbroad as to time and scope and would impose an undue
10 burden on Defendants. Additionally, there is no merit to
11 Plaintiff's contention that information about other complaints
12 lodged against LVN Stone for failure to provide medication is
13 relevant to his retaliation claim against Stone, because that
14 claim was dismissed by the Court. Accordingly, Plaintiff's motion
15 with respect to these interrogatories is DENIED.

16 b. Defendants' Employment History

17 In Plaintiff's interrogatory numbers 12 to Dr. Adam, 14 to
18 FNP Risenhoover, 5 to RN Escobar and 7 to LVN Stone, he inquires
19 about their employment histories prior to working at PBSP. In
20 interrogatory numbers 10-13 to FNP Risenhoover, 6-8 to RN Escobar
21 and 2 to LVN Stone, he inquires whether they were terminated from
22 any previous employment. Plaintiff states he is seeking evidence
23 that would show whether similar misconduct occurred at any medical
24 facilities that previously employed Defendants.

25 Defendants object to these requests on the grounds they seek
26 information that is not relevant, is not likely to lead to the
27 discovery of admissible evidence, is beyond the scope of
28 permissible discovery pursuant Rule 26, and is confidential and

1 protected under the official information privilege.

2 The Court finds the requested information is not discoverable
3 because it is inadmissible character evidence and is not relevant
4 to any claim or defense in this case. Defendants' employment
5 histories do not make the facts alleged by Plaintiff more or less
6 probable and are of no consequence in determining whether
7 Defendants acted with deliberate indifference to Plaintiff's
8 serious medical needs. Accordingly, Plaintiff's motion with
9 respect to these interrogatories is DENIED.

10 c. Defendants' Medical Education

11 In interrogatory numbers 14 to Dr. Adam and 18-19 to FNP
12 Risenhoover Plaintiff generally inquires about the education
13 required to become a neurologist, nurse practitioner and
14 physician's assistant. He claims the information is relevant to
15 show that Dr. Adam does not have the education of a neurologist
16 and that FNP Risenhoover has less knowledge than Dr. Adam. He
17 also claims that FNP Risenhoover's lack of education should have
18 caused her to defer to the neurologist's recommendation.

19 Defendants object to this request on the grounds that it
20 seeks information that is not relevant, not likely to lead to the
21 discovery of admissible evidence, and is beyond the scope of
22 permissible discovery pursuant to Fed. R. Civ. P. 26.

23 Plaintiff has failed to show how knowledge of these
24 Defendants' educational backgrounds would lead to the discovery of
25 admissible evidence relevant to his claims against them. As noted
26 by Defendants, Dr. Adam does not contend that she is a neurologist
27 or has the education of one, consequently, she cannot comment on
28 the education required to become a neurologist. Further, FNP

1 Risenhoover does not contend that she is a physician. Defendants
2 provided Plaintiff with showing that Dr. Adam is a licensed
3 physician and FNP Risenhoover is a licensed family nurse
4 practitioner. Opp'n Ex. H. Thus, their authority to practice
5 medicine is not contested.

6 Based on the above, the Court finds Plaintiff is not entitled
7 to receive this information from Defendants. Accordingly, his
8 request to compel answers to these interrogatories is DENIED.

9 d. Medical Records

10 Plaintiff's interrogatory/document request number 20 to FNP
11 Risenhoover requests a copy of an order written by her on January
12 13, 2010, discontinuing Plaintiff's Tylenol # 3 medication.
13 Defendants object on the grounds that Plaintiff's medical records
14 are equally available to him and that they are not in possession
15 of any such order. Further, Defendants included copies of the
16 medical records discussed in their motion for summary judgment as
17 exhibits to the motion. Thus, to the extent that such records
18 exist, Plaintiff already has, or has access to the documents
19 requested. In particular, Exhibit H to Defendants' motion
20 contains the medication administration form for the Tylenol #3.
21 It shows that the Tylenol #3 was discontinued on January 13, 2010,
22 by Dr. Adam, not by FNP Risenhoover.

23 Based on the above, Plaintiff's motion to compel production
24 of this information is DENIED.

25 e. Other Inmates' Medication Administration

26 Plaintiff's interrogatory number 20 (labeled as 19) to FNP
27 Risenhoover inquires how many inmates in Plaintiff's housing unit
28 at PBSP were receiving medication three times a day on December

1 22, 2009. Plaintiff claims this information is relevant to his
2 retaliation claim against Stone. As discussed above, however,
3 this claim against Stone was dismissed by the Court. Further,
4 Plaintiff has not shown how evidence concerning whether other
5 inmates were receiving a third pill pass is relevant to his
6 medical care. Accordingly, Plaintiff's motion to compel the
7 production of this information is DENIED.

8 f. Summary

9 The Court, having reviewed the parties' arguments and
10 evidence in support thereof, concludes that Plaintiff is not
11 entitled to an order compelling Defendants to provide him with the
12 requested discovery. Further, the Court finds, for the reasons
13 discussed below, that the merits of Plaintiff's claims are
14 amenable to decision without such information. Accordingly, the
15 motion to compel is DENIED in its entirety.

16 D. Motion to Stay Summary Judgment (Docket no. 53)

17 Plaintiff has filed a motion to stay decision on the motion
18 for summary judgment pending the completion of ongoing discovery
19 and his filing of an opposition to the motion for summary
20 judgment. Defendants have filed a statement of non-opposition to
21 Plaintiff's request.

22 The motion is DENIED as moot because Plaintiff is not
23 entitled to further discovery and the motion for summary judgment
24 has been fully briefed by the parties and is ready for decision by
25 the Court. Accordingly, the Court proceeds to address the merits
26 of Defendants' motion for summary judgment.

27 II. Motion for Summary Judgment

28 Plaintiff claims that Defendants provided him with

1 constitutionally inadequate medical treatment for his headaches,
2 facial nerve twitching and chest pains.

3 A. Legal Standard

4 Summary judgment is only proper where the pleadings,
5 discovery and affidavits show there is "no genuine issue as to any
6 material fact and that the moving party is entitled to judgment as
7 a matter of law." Fed. R. Civ. P. 56(c). Material facts are
8 those that may affect the outcome of the case. Anderson v.
9 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a
10 material fact is genuine if the evidence is such that a reasonable
11 jury could return a verdict for the nonmoving party. Id.

12 The court will grant summary judgment "against a party who
13 fails to make a showing sufficient to establish the existence of
14 an element essential to that party's case, and on which that party
15 will bear the burden of proof at trial." Celotex Corp. v.
16 Catrett, 477 U.S. 317, 322-23 (1986); see also Anderson, 477 U.S.
17 at 248 (holding fact to be material if it might affect outcome of
18 suit under governing law). The moving party bears the initial
19 burden of identifying those portions of the record that
20 demonstrate the absence of a genuine issue of material fact. The
21 burden then shifts to the nonmoving party to "go beyond the
22 pleadings, and by his own affidavits, or by the 'depositions,
23 answers to interrogatories, or admissions on file,' designate
24 'specific facts showing that there is a genuine issue for trial.'"
25 Celotex, 477 U.S. at 324 (citing Fed. R. Civ. P. 56(e)).

26 In considering a motion for summary judgment, the court must
27 view the evidence in the light most favorable to the nonmoving
28 party; if, as to any given fact, evidence produced by the moving

1 party conflicts with evidence produced by the nonmoving party, the
2 court must assume the truth of the evidence set forth by the
3 nonmoving party with respect to that fact. See Leslie v. Grupo
4 ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on
5 a summary judgment motion is not to make credibility
6 determinations or weigh conflicting evidence with respect to a
7 disputed material fact. See T.W. Elec. Serv. v. Pacific Elec.
8 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

9 A district court may consider only admissible evidence in
10 ruling on a motion for summary judgment. See Fed. R. Civ. P.
11 56(e); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).
12 A verified complaint may be used as an opposing affidavit under
13 Rule 56, as long as it is based on personal knowledge and sets
14 forth specific facts admissible in evidence. See Schroeder v.
15 McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

16 B. Analysis

17 1. Deliberate Indifference Standard

18 Deliberate indifference to serious medical needs violates the
19 Eighth Amendment's proscription against cruel and unusual
20 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
21 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
22 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
23 1136 (9th Cir. 1997) (en banc). A determination of "deliberate
24 indifference" involves an examination of two elements: the
25 seriousness of the prisoner's medical need, and the nature of the
26 defendant's response to that need. See id., 974 F.2d at 1059.

27 A serious medical need exists if the failure to treat a
28 prisoner's condition could result in further significant injury or

1 the unnecessary and wanton infliction of pain. Id. The existence
2 of an injury that a reasonable doctor or patient would find
3 important and worthy of comment or treatment, the presence of a
4 medical condition that significantly affects an individual's daily
5 activities, or the existence of chronic and substantial pain are
6 examples of indications that a prisoner has a serious need for
7 medical treatment. Id. at 1059-60.

8 A prison official is deliberately indifferent if he knows
9 that a prisoner faces a substantial risk of serious harm and
10 disregards that risk by failing to take reasonable steps to abate
11 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison
12 official must not only "be aware of facts from which the inference
13 could be drawn that a substantial risk of serious harm exists,"
14 but he "must also draw the inference." Id. In order for
15 deliberate indifference to be established, therefore, there must
16 be a purposeful act or failure to act on the part of the defendant
17 and resulting harm. See McGuckin, 974 F.2d at 1060.

18 Deliberate indifference may be shown when prison officials
19 deny, delay or intentionally interfere with medical treatment, or
20 it may be shown in the way in which they provide medical care.
21 See id. at 1062. But neither a difference of opinion between a
22 prisoner-patient and prison medical authorities regarding
23 treatment nor a showing of nothing more than a difference of
24 medical opinion as to the need to pursue one course of treatment
25 over another is sufficient to establish deliberate indifference.
26 See Toguchi v. Chung, 391 F.3d 1051, 1059-60 (9th Cir. 2004). In
27 order to prevail on a claim involving choices between alternative
28 courses of treatment, a plaintiff must show that the course of

1 treatment the doctors chose was medically unacceptable under the
2 circumstances, and that they chose this course in conscious
3 disregard of an excessive risk to the plaintiff's health. Id. at
4 1058. Further, individual defendants cannot be held liable for
5 acting with deliberate indifference when they are unable to render
6 or cause to be rendered medical treatment because of a lack of
7 resources that is not within their power to cure. Peralta v.
8 Dillard, 704 F.3d 1124, 1129 (9th Cir. 2013).

9 2. Plaintiff's Claims

10 a. Headaches and Facial Twitching

11 Defendants maintain that Plaintiff's headaches and facial
12 twitching do not constitute a serious medical need, but offer no
13 argument to support their contention. Based on the evidence
14 detailed above, the Court finds Plaintiff has shown that he has a
15 serious medical need.

16 i. LVN Stone and LVN Andrsh

17 Plaintiff alleges LVN Stone and LVN Andrsh were deliberately
18 indifferent for allegedly administering 2 cc less than the correct
19 dosage of Gabapentin on three occasions. Even when the facts are
20 viewed in a light most favorable to Plaintiff, they fail to
21 establish that these Defendants acted with deliberate indifference
22 to Plaintiff's serious medical needs. Instead, the facts
23 establish that Defendants' alleged actions were, if anything,
24 isolated occurrences of neglect that do not rise to the level of
25 an Eighth Amendment violation. See O'Loughlin v. Doe, 920 F.2d
26 614, 617 (9th Cir. 1990) (repeatedly failing to satisfy requests
27 for aspirins and antacids to alleviate headaches, nausea and pains
28 is not constitutional violation; it may constitute grounds for

1 medical malpractice but does not rise to level of unnecessary and
2 wanton infliction of pain). Negligence is insufficient to
3 establish deliberate indifference to serious medical needs. See
4 Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

5 Moreover, Plaintiff concedes that Defendants' actions did not
6 result in "any measurable injury" to him. Opp'n at 13:5-6.

7 Because Plaintiff has failed to raise a triable issue of
8 material fact with respect to whether Defendants Stone and Andrsh
9 acted with deliberate indifference to his serious medical needs,
10 summary judgment is GRANTED to these Defendants on this claim.

11 ii. Dr. Adam and FNP Risenhoover

12 Plaintiff claims that Defendants Dr. Adam and FNP Risenhoover
13 provided constitutionally inadequate medical care by refusing to
14 renew his Gabapentin prescription to treat his headaches and
15 facial nerve twitching. He argues that, because such medication
16 was recommended by a neurologist and prescribed by prison doctors
17 at Corcoran, Defendants acted with deliberate indifference by not
18 following suit. Defendants contend, however, that their actions
19 were reasonable and in accordance with CDCR policy and accepted
20 medical standards of care. In support of their assertions,
21 Defendants have provided the declarations of Dr. Adam and Dr.
22 Sayre and supporting documents from Plaintiff's medical records.

23 According to the evidence provided by the parties,
24 Plaintiff's original prescription for Gabapentin in 2008 was for
25 an off-label use for neuropathy. Contrary to Plaintiff's
26 assertions, the evidence does not show that prior to his transfer
27 to PBSP he was prescribed Gabapentin by prison doctors at Corcoran
28 to treat what had been diagnosed as migraine headaches. Instead,

1 the record shows that after the neurologist's recommendation that
2 Plaintiff be treated with Lyrica, a drug that is used to treat
3 pain from damaged nerves, prison doctors at Corcoran prescribed
4 Gabapentin "for facial twitching," and prescribed Tramadol, a pain
5 reliever, for Plaintiff's headaches. Opp'n Ex. K at 193.
6 Further, Plaintiff has not presented medical evidence that calls
7 into question Defendants' informed decision that Gabapentin was
8 not medically indicated for Plaintiff's condition. In particular,
9 there is no dispute that the use of Gabapentin for treatment of
10 neurologic pain is an off-label use of the drug, that CDCR policy
11 prohibits the prescription of medications for off-label use unless
12 there is some documented evidence-based need, and that recent
13 medical research has shown that headaches and neuropathic pain are
14 off-label uses of Gabapentin and there is no evidence-based
15 documentation to support such use. Sayre Decl. ¶ 6.

16 Thus, despite the fact that Gabapentin was prescribed by
17 prison doctors at Corcoran, Dr. Sayre, Dr. Adam and FNP
18 Risenhoover determined that it was not medically indicated in this
19 case. Plaintiff has not presented medical evidence that calls
20 into question the reasonableness of their medical opinions in this
21 regard. Although he complains that the medications he was
22 provided for his headaches and facial twitching were not as
23 beneficial to him as Gabapentin, he concedes that it was up to the
24 discretion of his medical providers to prescribe Gabapentin.
25 Opp'n at 16:9-16. The evidence shows that Defendants took
26 reasonable steps to treat his symptoms, addressed his complaints
27 in a timely manner, and adjusted his medications in accordance
28 with their accepted medical use.

1 Based on this record, the Court finds that Plaintiff has not
2 raised a genuine issue for trial with respect to whether Dr. Adam
3 and FNP Risenhoover acted with deliberate indifference to his
4 serious medical needs. Accordingly, summary judgment is GRANTED
5 in their favor.

6 b. Chest Pain

7 Plaintiff alleges that RN Escobar was deliberately
8 indifferent for not ordering an EKG, a cardiology consultation or
9 admittance to the emergency facility for his enlarged heart and
10 chest pains. As an initial matter, Plaintiff has not presented
11 evidence that raises a triable issue of material fact with respect
12 to whether he indeed suffers from an enlarged heart or any heart
13 condition that rises to the level of a serious medical need.
14 Instead, the evidence shows that x-rays of Plaintiff's chest taken
15 in December 2009 and March 2010 were unremarkable, as were the
16 results from EKGs he underwent On April 1 and 10, 2010, for his
17 chest pains. Ly Decl. Ex. K; Adam Decl. ¶ 5.

18 Even if Plaintiff's medical need in this regard is serious,
19 he has not presented evidence that substantiates his contention
20 that RN Escobar acted with deliberate indifference thereto.
21 Specifically, the undisputed evidence shows that when Escobar was
22 called to respond to Plaintiff's cell for complaints of chest pain
23 and loss of breath on March 18, 2010, he took his vital signs,
24 noted that they were well within the normal range and that
25 Plaintiff had no shortness of breath, was not gasping for air and
26 was speaking clearly. Escobar escorted Plaintiff to the medical
27 clinic and, upon reviewing Plaintiff's file, noted that his
28 previous x-rays did not show an enlarged heart and that he had

1 refused to attend his most recently scheduled appointment for an
2 EKG. Ly Decl. Ex. L. Based on this assessment, Escobar
3 reasonably determined that Plaintiff's symptoms were not cardiac
4 related. Further, when, later that night, Plaintiff complained of
5 dizziness and shortness of breath, he was assessed by a different
6 nurse, who similarly determined that his symptoms did not appear
7 to be cardiac related and gave him Almacone for indigestion and
8 Ibuprofen for chest pain. Id. Ex. M.

9 Based on the above, the Court finds that Plaintiff has
10 failed to raise a triable issue of material fact with respect to
11 whether RN Escobar acted with deliberate indifference to his
12 serious medical needs. Rather, the evidence, when viewed in the
13 light most favorable to Plaintiff, shows that Escobar's actions
14 were reasonable under the circumstances and that Plaintiff did not
15 suffer injury as a result thereof. Accordingly, summary judgment
16 is GRANTED to Defendant Escobar on this claim.

17 3. Qualified Immunity

18 All Defendants argue that they are entitled to qualified
19 immunity. The defense of qualified immunity protects "government
20 officials . . . from liability for civil damages insofar as their
21 conduct does not violate clearly established statutory or
22 constitutional rights of which a reasonable person would have
23 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The
24 threshold question in qualified immunity analysis is: "Taken in
25 the light most favorable to the party asserting the injury, do the
26 facts alleged show the officer's conduct violated a constitutional
27 right?" Saucier v. Katz, 533 U.S. 194, 201 (2001). The relevant,
28 dispositive inquiry in determining whether a right is clearly

1 established is whether it would be clear to a reasonable defendant
2 that his conduct was unlawful in the situation he confronted. Id.
3 at 202.

4 On the facts presented herein, viewed in the light most
5 favorable to Plaintiff, Defendants prevail as a matter of law on
6 their qualified immunity defense because the record establishes no
7 constitutional violation. Even if a constitutional violation did
8 occur, however, Defendants reasonably could have believed their
9 conduct was lawful. Specifically, it would not have been clear to
10 Defendants that they failed to take reasonable steps to abate a
11 substantial risk of harm to Plaintiff by providing him with the
12 above-described care and treatment for his migraine headaches,
13 facial twitching and chest pains.

14 Accordingly, Defendants are entitled to qualified immunity,
15 and their motion for summary judgment is GRANTED for this reason
16 as well.

17 CONCLUSION

18 For the foregoing reasons, the Court orders as follows:

- 19 1. Summary judgment is GRANTED in favor of all Defendants.
20 (Docket no. 50.)
- 21 2. Plaintiff's motion for a subpoena duces tecum is DENIED.
22 (Docket no. 27.)
- 23 3. Plaintiff's motion for an enlargement of time is DENIED
24 as moot. (Docket no. 31.)
- 25 4. Plaintiff's motion to expand the interrogatory limit is
26 DENIED. (Docket no. 33.)
- 27 5. Plaintiff's motion for leave to file an amended
28 complaint is GRANTED. (Docket no. 34.)

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1 6. Plaintiff's motion for reconsideration is DENIED.
2 (Docket no. 35.)

3 7. Plaintiff's motion for leave to depose Dr. Adam orally
4 is DENIED. (Docket no. 36.)

5 8. Defendants' motion for a protective order is GRANTED.
6 (Docket no. 42.)

7 9. Plaintiff's motion to compel is DENIED. (Docket no.
8 52.)

9 10. Plaintiff's motion to stay summary judgment is DENIED as
10 moot. (Docket no. 53.)

11 The Clerk of the Court shall enter judgment in favor of
12 Defendants and close the file. All parties shall bear their own
13 costs.

14 This Order terminates Docket nos. 27, 31, 33, 34, 35, 36, 42,
15 50, 52 and 53.

16 IT IS SO ORDERED.

17 Dated: 3/26/2013


CLAUDIA WILKEN
United States District Judge